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*Federal Public Sector  
Labour Relations and  
Employment Board Act and  
Public Service Employment Act*



Before a panel of the  
Federal Public Sector  
Labour Relations and  
and Employment Board

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BETWEEN

**JOSIAH SMITH**

Complainant

and

**DEPUTY MINISTER OF NATIONAL DEFENCE**

Respondent

and

**OTHER PARTIES**

Indexed as

*Smith v. Deputy Minister of National Defence*

In the matter of complaints of abuse of authority - paragraph 77(1)(a) of the *Public Service Employment Act*

**Before:** Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Louis Bisson, Union of National Defence Employees

**For the Respondent:** Richard Fader, counsel

**For the Public Service Commission:** Louise Bard, analyst (written submissions)

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Heard at Fredericton, New Brunswick,  
January 30 and 31, 2018.

### **I. Complaint before the Board**

[1] Josiah Smith, the complainant, filed two complaints with the Public Service Labour Relations and Employment Board (renamed on June 19, 2017, as the Federal Public Sector Labour Relations and Employment Board; “the Board”) against the acting and then the indeterminate appointment of Timothy Lonsdale (“the appointee”) to the position of production superintendent, classified at group and level GL-COI-12, at Canadian Forces Base (CFB) Gagetown in New Brunswick.

[2] The complainant and the appointee are civilian employees of the Department of National Defence. The deputy head of that department is the respondent in this case. The complainant submits that the respondent abused its authority by making the appointments in the non-advertised process 15-DND-ACIN-GGTWN-397545 for an acting position and in the advertised process 15-DND-IA-GGTWN-397937 for an indeterminate position. The respondent denies that there was any abuse of authority.

### **II. Background**

[3] The complainant works at CFB Gagetown as a senior project manager classified at the GL-COI-11 group and level. In 2011, he replaced his immediate supervisor.

[4] In 2012, a subordinate filed a harassment complaint against the complainant and three other people. An investigation was carried out, and in May 2013, the complainant received a letter that stated that six of the seven harassment allegations had been substantiated and that disciplinary measures would be imposed. However, a meeting would first be held for the complainant to explain his position.

[5] This meeting was held in November 2013, with the complainant, his bargaining agent representative, and Lieutenant-Colonel Madic, the base commander, in attendance. According to the complainant’s evidence, he presented solid evidence that he had not harassed anyone. He also testified that Lt.-Col. Madic agreed to wait for him to receive all the information he had requested through access to information and privacy (ATIP) legislation before imposing any disciplinary measure based on the results of the harassment investigation.

[6] In December 2013, Captain Cory Gaudet, the complainant’s immediate supervisor, emailed shop supervisors about rumors that were circulating that the complainant was supervising personnel. The email read in part as follows:

...

*I have heard rumors and complaints going around about Mr. Smith being back in the shops chain of command while still proceeding through his ongoing Harassment Investigation....*

*If you look at the org charts it is quite clear the Mr. Smith along with [X] only report directly to me and have no subordinates. Any action they take, to gather information or complete work is on my behalf. They both function in a typical squadron ops role. (for those not familiar with a mil org, Ops reports to HQ and have no subordinates, they exist only to co-ordinate the different work groups so collective work can be accomplished)*

*I would be happy to answer any further questions concerning this, but spreading false and unfounded rumors is not acceptable and continues to bring down attitudes in the workplace. I am not saying anyone I'm sending this to is responsible, simply ensuring all supervisors are aware of the facts if they hear these rumors.*

[Sic throughout]

[7] Despite having told the complainant that he would wait for the ATIP information before imposing discipline, Lt.-Col. Madic signed a letter on March 28, 2014, a few days before his departure from the base, which imposed an eight-day suspension on the complainant for harassment. He grieved the suspension.

[8] Lt.-Col. Madic was replaced by Lt.-Col. MacEachern as base commander on March 31, 2014. After hearing the grievance at the first level of the grievance procedure, Lt. Col. MacEachern set aside the conclusions of the harassment investigation.

[9] The production superintendent at CFB Gagetown reports to the production officer and supervises six shops (Structural, Mechanical, Combined, Electrical, Roads & Grounds, and Tool Crib) comprising approximately 100 employees. During Lt.-Col. Madic's tenure, the position became vacant, and the complainant expressed an interest in filling it. According to evidence heard at the hearing, Lt.-Col. Madic wanted to eliminate the position, which he did not think was necessary (at a time when the department needed to cut civilian positions because of workforce reductions mandated by the federal government). When he was informed of the complainant's request in November 2013, his response was as follows:

*While there are other more signif reasons why putting Mr Smith into this posn would never occur, I concur with Greg's comments below. [Comments follow to the effect that the position was to be eliminated under a reorganization of base staff.]*

*Ensure Mr Smith knows this posn is being eliminated forthwith and his req is denied.*

[Sic throughout]

[10] Capt. Gaudet, the military production officer responsible for the shops, did not agree that the position should be eliminated. With the change of leadership at the base, the position remained, and management sought to fill it.

[11] In May 2015, Manon Elliott, an administration officer in the Human Resources (HR) section, circulated an email to inform all employees at CFB Gagetown of an acting opportunity in the "Production Superintendent (GL-COI-12/D7) position." The email stated that the acting opportunity was for a one-year assignment or until the position was indeterminately staffed.

[12] Applicants were invited to submit their résumés. A "Statement of Merit Criteria" (SOMC) was included with the email.

[13] The appointee was first appointed for a four-month-less-a-day term; such a term entails no notification obligation. The term was extended from December 24, 2015, to August 24, 2016 (the first term had started on August 24, 2015). A notification of the appointment was then published, and the complainant filed his first complaint against it, alleging that the following three actions demonstrated abuse of authority.

[14] First, the appointee did not meet the following essential qualification found in the SOMC: "Experience supervising multi-trade work groups responsible for providing municipal/public services and building and infrastructure maintenance on both a programmed and emergency basis."

[15] Second, there was a reasonable apprehension of bias on the part of those involved in the selection process, as they had also been involved in or informed of the labour relations issues the complainant had had with the respondent.

[16] Third, the respondent did not properly assess the complainant on two asset qualifications and on question 1 of the written exam.

[17] In November 2015, the respondent advertised a selection process to fill the position indeterminately. The complainant applied. The appointee was appointed indeterminately on May 17, 2016. The complainant filed his second complaint.

[18] The allegations in the second complaint were similar to those in the first. As concerns the appointee's qualifications, not only did he not have the experience as stated in the first complaint, but also, it was alleged that he did not have the proper occupational certification as required in the Job Opportunity Advertisement. The complainant's assessment was again defective, this time based on another written exam. The allegation of bias related to labour relations issues remained the same.

[19] In the original allegations filed before the hearing, additional grounds of abuse of authority were noted for both selection processes. They were withdrawn at the hearing and will not be discussed in this decision.

[20] The complainant testified at the hearing and called two witnesses, Ms. Elliott and Paula McGinn, who at the relevant time was the HR coordinator for the construction/engineering group at CFB Gagetown.

[21] The respondent called three witnesses, including Capt. Gaudet, who was the production officer, the complainant's supervisor, a member of the selection board for the first process, and the screener for the second process. He left before the second process was completed and was replaced as selection board member by Jonathan Parker, a senior project manager and professional engineer. Mr. Parker testified at the hearing. So did Major Nathan Price, who in 2014 was the deputy commanding officer of CFB Gagetown; he became its commanding officer in July 2015. He was responsible for the base's production unit and was the manager delegated to staff the position at issue.

### **III. Issues**

[22] The issues in this case can be stated as follows:

- Did the respondent abuse its authority by showing bias against the complainant related to the harassment investigation or the subsequent grievance?
- Did the respondent abuse its authority by improperly assessing the

complainant?

- Did the respondent abuse its authority by improperly assessing the appointee?

#### IV. Analysis

[23] The complainant alleges that the respondent abused its authority. He brings his complaints under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), which reads as follows:

*77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of*

*(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2) ....*

[24] Section 30 states that the appointment must be made on the basis of merit; that is, as stated in s. 30(2)(a), the appointee must meet all the essential qualifications for the position. The deputy head may also consider additional asset qualifications.

[25] The *PSEA* does not define “abuse of authority”, except to specify at s. 2(4) the following: “For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.”

[26] In its arguments, the respondent endorsed the Public Service Commission’s submission that abuse of authority must be understood in light of the two examples given in the legislation. By virtue of the principle of *ejusdem generis* (of the same kind, class, or nature), since Parliament has given two instances of abuse of authority, which can both be characterized as not only egregious but also deliberate conduct, any finding of abuse of authority must have the same traits.

[27] Since the creation of the Public Service Staffing Tribunal (PSST), a predecessor of this Board, case law has developed to further define what constitutes abuse of authority. Starting with *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, the PSST sought to define “abuse of authority” in terms that would allow both the flexibility inherent in the *PSEA* and a respect for the staffing values in the public *Federal Public Sector Labour Relations and Employment Board Act* and *Public Service Employment Act*

service, as found in the legislation's preamble.

[28] As the PSST and the Board have said before me, Parliament chose not to define "abuse of authority" to allow the PSST and now the Board the latitude to find instances of abuse of authority other than bad faith or personal favouritism. In sum, abuse of authority is not a mere error or oversight. It is an exercise of discretion by the deputy head that far exceeds the purposes for which this discretion was granted. Flexibility cannot justify an unfair arbitrariness in the exercise of authority. To hark back to the very first decision rendered on the matter, *Tibbs*, abuse of authority can be grouped into the following five categories (see paragraph 70):

*... Jones and de Villars [David Philip Jones and Anne S. de Villars, Principles of Administrative Law] ... have identified five categories of abuse found in jurisprudence. As the learned authors note at page 171, these same general principles of administrative law apply to all forms of discretionary administrative decisions. The five categories of abuse are:*

- 1. When a delegate exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations).*
- 2. When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).*
- 3. When there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions).*
- 4. When the delegate exercises discretion on an erroneous view of the law.*
- 5. When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.*

[29] The PSST then adds the following at paragraph 71:

*What these five types of abuse all have in common is that Parliament could not have intended to delegate the authority to act in such an outrageous, unreasonable or unacceptable way: Jones and de Villars, supra, at 169; Macauley & Sprague [Robert W. Macauley and James L.H. Sprague, Practice and Procedure before Administrative Tribunals, vol. 1] ... at 5B.3(a). As the Supreme Court explained in Roncarelli [Roncarelli v. Duplessis, [1959] S.C.R. 121 at 140] ..., unless*

*there is express language in the legislation to indicate the contrary, it is implied that Parliament could not have intended the delegate to exercise discretion in these ways.*

[30] With this standard in mind, I shall now consider the complainant's three allegations.

**A. Issue I – Did the respondent abuse its authority by showing bias against the complainant related to the harassment investigation or the subsequent grievance?**

[31] The complainant's allegation was worded as follows:

...

*The Respondent created an apprehension of Bias (during the assessment in the application of merit, in the choice of process and the in the application of merit at the selection of the right fit stage) because some individual(s) with knowledge and/or who received directions and/or who took part in an investigation involving the Complainant for a labour relations matters were allowed to have a role in his assessment and/or in the decision making process of the acting appointment subject to this complaint....*

...

[Sic throughout]

[32] The test for the apprehension of bias has been often stated (see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369) and restated in the context of staffing complaints. In *Denny v. Deputy Minister of National Defence*, 2009 PSST 29 at para. 126, the PSST stated the test for bias, applicable to selection board members, in the following terms:

*... members of the assessment board have a duty to act fairly, which includes a bias-free assessment. If a reasonably informed bystander looking at the process could reasonably perceive bias on the part of one or more of the assessment board members, then the duty to act fairly has not been met. It is also important to emphasize that one of the key values articulated in the preamble of the PSEA is fairness.*

[33] In that decision, the complainant alleged that he had been unfairly assessed because one of the members of the assessment board was biased against him. The PSST did find that there was a reasonable apprehension of bias, since there was a history of animosity between the board member and the complainant. The assessment itself was seriously flawed, and the fact that the practical test was administered by the



board member who was allegedly biased simply reinforced the impression of an unfair, biased, and very deficient assessment. This amounted to an abuse of authority.

[34] In *Amirault v. Deputy Minister of National Defence*, 2012 PSST 6, the PSST again found that there was a reasonable apprehension of bias and that the appointment process was tainted. In that case, the complainant had current issues, in the form of a complaint before the former Public Service Labour Relations Board, with one of the two assessment board members, and had had serious conflicts with the other board member in the past. The assessment included a number of open-ended questions for which the assessment board had to exercise its discretion to mark the answers. According to the PSST, an informed person would have reasonably perceived bias on the part of the board in assessing the complainant.

[35] In the present case, the complainant claims that because of the harassment investigation, the decision makers on the base were not willing to contemplate giving him the position. As evidence of this bias, he introduced Lt.-Col. Madic's email (quoted earlier) that stated that there were "other ... signif[icant] reasons" not to give the complainant the position, as well Capt. Gaudet's email (also quoted earlier) that referred to the harassment investigation.

[36] Ms. Elliott and Ms. McGinn confirmed Lt.-Col. Madic's opposition to having the complainant in the superintendent role. However, one must keep in mind the dates of the events.

[37] When Lt.-Col. Madic wrote his email, in December 2013, he had in hand the conclusions of the harassment investigation. He had listened to the complainant dispute those findings, but the process was still ongoing. It seems that in the end, Lt.-Col. Madic still believed those conclusions, since he signed a suspension letter just before leaving the base. If he believed the harassment charges, then it is understandable that he did not want the complainant in a major supervisory role.

[38] However, Lt.-Col. Madic left in 2014, one year before the start of the first process for the acting appointment. By 2015, Lt.-Col. MacEachern had set aside the findings of the harassment investigation, and management decided not to pursue the harassment claims any further. There is no allegation that Lt.-Col. MacEachern contributed in the least to a bias against the complainant.

[39] Capt. Gaudet testified that although he was aware there had been a harassment investigation, as indicated by his December 2013 email, he did not know its details. He also testified that by 2015, he saw no reason why the complainant could not be considered an applicant for the position. Indeed, in both processes, the complainant was considered a qualified applicant. The differences between the appointee and the complainant were asset criteria for the acting position and general suitability for the indeterminate position, as will be discussed later in this decision.

[40] Capt. Gaudet explained that his email had not provided any new information on the harassment investigation to anyone, as it was common knowledge on the base. Rather, it had been sent to counter rumors that the complainant was supervising staff. There was no animosity involved.

[41] As will be explained further on, I find that the respondent's decisions made in appointing the appointee were reasonable. They do not appear tainted by bias. By 2015, after the base commander, Lt.-Col. MacEachern, decided to set aside the conclusions of the harassment investigation report, and a year after Lt.-Col. Madic had left the base, I do not think there was any indication that the selection board was biased against the complainant. Mr. Parker, who took over when Capt. Gaudet left, did not know the complainant and had not heard of the harassment investigation. I did not hear from the other selection board members, but again, the assessment appears to have been fair, as will be discussed further.

[42] Mr. Parker provided one additional fact that to me reflects an absence of bias. In the second process, the complainant was initially eliminated from the selection process for having failed a question on the written exam. He requested an informal discussion and met with Mr. Parker to represent to him that he did in fact have a correct answer. Mr. Parker agreed that the answer was acceptable, gave the complainant a passing mark, and thus screened him back into the selection process.

[43] Finally, Maj. Price, who took over the appointment process started by Maj. Burbidge, did not know the complainant and was unaware of the contents of the investigation or of the grievance, which Lt.-Col. MacEachern dealt with.

[44] Therefore, I find an informed person would not reasonably perceive the selection process to have been tainted by bias.

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**B. Issue II - Did the respondent abuse its authority by improperly assessing the complainant?**

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[45] The first process to staff the acting position was non-advertised; that is, it was not published on the federal government website that advertises job opportunities. However, the opportunity was made available to the employees of CFB Gagetown, and 16 persons applied. The assessment was done by way of screening and a written exam. According to Capt. Gaudet, four people were qualified, including the complainant. The appointee was chosen on the basis of asset criteria.

[46] On the evaluation sheet for the 16 applicants to the acting position, all names and information were redacted (for the purposes of the hearing), except for the complainant and the appointee. For the appointee, the comments read as follows: “Met all Essentials, Assets 7/7. Ability Q1 = 3/4”. For the complainant, the comments were as follows: “Met all Essentials, Assets 5/7. Ability Q1 = 2/4”. Both Capt. Gaudet and Maj. Price testified that the appointee’s superior rating justified his selection.

[47] The complainant claimed that he did in fact show in his résumé that he had the two asset criteria that according to this evaluation, he did not have. The first one was “A6 - Experience in managing a preventative maintenance program” (“A6”). The second one was “A7 - Experience with compliance standards and regulations” (“A7”).

[48] In his résumé, the complainant pointed to the following items to show A6 experience:

[As production OPS coordinator:]

*Managing/monitoring allocating financial resources for Preventative Maintenance Projects being address [sic] by Production trades staff...*

[As senior project manager and project manager:]

*Manage construction and maintenance projects including scope, time, cost, communication, procurement, human resources, financial and quality management on all projects.*

[49] According to Capt. Gaudet, these were not sufficient. They did not show managing a preventative maintenance program in the context of the base shops, and they were not specific enough.

[50] To show his A7 experience, the complainant pointed to the following item in his résumé:

*I was the Co-Chair/member of 5 ESU Occupational Health and Safety Committee for 20+ years. Some of the tasks involved creating Health and Safety SOP's (Confined Space, Hardhat, Safety footwear) Risk Analysts/Assessments (Hardhats, Confined Spaces). Investigating accidents/work refusals etc, addressing the accident forms both internal and external (WSNB) Also performed the duties of the Safety Officer for several months in 2010(May to August) as the position was vacant. I was the HMRA (Hazardous Materials Reference Application) editor/manager for the Projects Group.*

[51] According to Capt. Gaudet, the experience sought was managing compliance regulations, with knowledge of the full compliance process, including auditing and action plans. This went far beyond experience acquired on an Occupational Health and Safety Committee.

[52] By contrast, the respondent had found that those two asset criteria were met in the appointee's résumé. For the A6 criterion, the following appeared:

- *As the Preventative Maintenance Officer (PMO) of 5 ESU, 5 CDSB Gagetown*
  - *Responsible for 7 Preventive Maintenance Inspectors including the management, scheduling and assigning of engineering preventive maintenance inspections, provision of training and guidance, reviewed work and prepared performance review reports;*
  - *Provided opportunity to personnel to take the necessary training to stay abreast of new construction and maintenance practices;*
  - *Explained or demonstrated established working practices and procedures and provided technical guidance to work team members and new employees; and*
  - *Developed work descriptions and staffing documents.*
- *...*
- *Have used Excel to schedule and manage the Unit Preventive Maintenance program.*
- *As an Electrical Generating Systems (EGS) Design Warrant*

*Officer, 1 Engineer Support Unit, Moncton NB*

- *Utilized both Excel and MS Project for planning/management/forecasting of multidisciplinary infrastructure projects.*
- *As the EGS Section Commander, CFSME, 5 CDSB Gagetown*
- *Utilized both Excel and MS Project for planning/management of lesson plan development, coordination of instruction between multiple sections/squadrons and generator installations.*

[Sic throughout]

[53] For the A7 criterion, the following appeared:

*As noted above, I have extensive work experience related to the field of planning and project management while employed with the Canadian Forces and as a DND employee. All work, whether in country or overseas was conducted in accordance with Canadian standards and codes (i.e. Canadian Electrical Code, National Building Code, National Fire Code, National Plumbing Code, Canadian Standards Association, Financial Administration Act, Environmental Act, Defense [sic] Administrative Orders and Directives, etc.)*

[54] As has been stated in numerous PSST and Board decisions, the Board is not tasked with reassessing candidates (see, for example, *Soccar v. the Commissioner of the Royal Canadian Mounted Police*, 2013 PSST 14). To find an abuse of authority in how candidates were marked, there would have to be a significant departure from what may be considered a reasonable assessment. Capt. Gaudet provided a reasonable explanation for finding that the complainant did not meet the A6 and A7 asset criteria. I find no reason to question that assessment.

[55] With respect to the mark the complainant received for question 1 of the written assessment, although the issue was discussed at length at the hearing, I again find no reason to question that marking. The question had 4 elements; the complainant only answered 2 of those elements; and, correspondingly, received a score of 2 out of 4.

[56] In the second process, the complainant scored 17 out of 20 for the written exam. Since the pass mark was 14, he passed. However, one of the questions was wrongly marked, as Mr. Parker conceded at the hearing. The candidate had to identify a date on a technical drawing. Although Capt. Gaudet disputed that the complainant had answered correctly, the fact is that his answer is what appeared on the Federal Public Sector Labour Relations and Employment Board Act and Public Service Employment Act

respondent's answer key. The complainant should have obtained 18 out of 20.

[57] However, even if the complainant had obtained an additional point, the appointee still had a higher score: he obtained 20 out of 20. Moreover, and more importantly, the appointee scored consistently higher in the interview questions, which the complainant did not dispute. Maj. Price explained that he decided to hire the appointee based on the total score sheet. Even with the additional point for the complainant, the score sheet would still have remained much better for the appointee.

[58] The test for finding an abuse of authority is set at a rather high level. A minor error that does not affect the outcome of a process cannot be considered an abuse of authority. An additional point on the written exam would not have greatly affected the complainant's overall assessment. There was no allegation or evidence that the interview questions had not been marked fairly. The appointee scored consistently higher on them, and Maj. Price stated clearly that the overall score was the determining factor in selecting the appointee. As with the first process, I find nothing unreasonable with the complainant's assessment in the second process.

### **C. Issue III - Did the respondent abuse its authority by improperly assessing the appointee?**

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[59] In the first complaint, the complainant challenged the appointee's claim that he had one of the essential qualifications, "Experience supervising multi-trade work groups responsible for providing municipal/public services and building and infrastructure maintenance on both a programmed and emergency basis." This claim was repeated in the second complaint.

[60] Capt. Gaudet, who did the screening for both processes, stated that in his opinion, the appointee did have the necessary experience, and pointed to the following extracts of the appointee's résumé to support his position:

- *Supervised multi-disciplinary Preventive Maintenance Inspectors in their role to provide programmed maintenance/inspections, commissioning and emergency inspections/repairs.*

...

- *Supervised multi-disciplinary crews on security development/emergency repair projects for a variety of Government of Afghanistan organizations (Corrections,*

*National Directorate of Security, Kandahar Provincial Council and the Governor of Kandahar).*

...

- *Assigned as the head of the project management team as well as the Electrical and Mechanical Designer. Responsible for supervising military project managers/multi-disciplinary construction engineers to facilitate the completion of numerous new/maintenance infrastructure projects in support of the Jamaican Defence Force.*

[61] Again, the Board's task is not to reassess the candidates. Capt. Gaudet's explanation as to why the appointee's experience met the experience criterion was reasonable and satisfactory.

[62] In the second complaint, the complainant raised a question about the appointee's occupational certification, which was one of the essential qualifications for the position.

[63] The qualification was stated in the Job Opportunity Advertisement in the following terms:

*EDUCATION / OCCUPATIONAL CERTIFICATION:*

- *Possession of a valid journeyperson certificate in one of the construction trades as issued under the New Brunswick Apprenticeship and Occupational Certification Act.*

*OR*

- *A diploma as an engineering technologist/technician, or a member of NBSCETT (New Brunswick Society of Certified Engineering Technicians and Technologists) at the engineering technician level in a related building construction field.*

[64] In his résumé, the appointee wrote "CET", which Capt. Gaudet understood to mean "certified electrical technician". In fact, and more on this later, "CET" is a reserved title for "Certified Engineering Technician", granted by the New Brunswick Society of Certified Engineering Technicians and Technologists (NBSCETT).

[65] On the NBSCETT's website, the appointee's name appears, with the mention "CTech". The respondent also introduced as evidence a certificate from the NBSCETT

website in the appointee's name, which states, after his name, "Certified Technician, CTech", and then the following words: "Is a member of the New Brunswick Society of Certified Engineering Technicians and Technologists, having met the requirements for certification as a Certified Technician (electrical)".

[66] The parties agreed that to meet the essential qualification, the appointee had to be "a member of NBSCETT ... at the engineering technician level", since the other means of establishing his occupational status did not apply. Therefore, the question is whether he is, indeed, "a member of NBSCETT ... at the engineering technician level".

[67] The complainant was adamant that the appointee was not at the engineering technician level, since his certificate stated only "Certified Technician" as opposed to "Certified Engineering Technician".

[68] Capt. Gaudet explained that the CTech designation was sufficient, since the appointee was a member of the NBSCETT and the certification was "at the engineering technician level" since it specified an area (electrical) that is part of the engineering world.

[69] In its arguments, the respondent adopted Capt. Gaudet's point of view, parsing the words "engineering technician level" to include the designation of Certified Technician, CTech (electrical), since it was admitted that the appointee was a member of the NBSCETT and that he was certified in one of the engineering areas, namely, electricity.

[70] I find Capt. Gaudet and the respondent's reasoning persuasive. Without more, the complainant's assertion, based only on the difference in wording of the two designations, is not sufficient to convince me otherwise or that there has been an abuse of authority in this regard.

[71] While this sufficiently addresses the complainant's allegation, I note that neither party referred me to the NBSCETT, the certifying organization, as a source of information to understand the difference between a "Certified Technician" and a "Certified Engineering Technician" and to determine whether a "Certified Technician" could be considered a "... member of NBSCETT ... at the engineering technician level ...".



[72] A quasi-judicial administrative tribunal such as the Board is loath to seek its own evidence. However, in its legal analysis, it may consider relevant legislation and widely available sources of undisputed information. I have considered the legislation that enacted the NBSCETT as the certifying body as well as information found on its official website.

[73] The NBSCETT was created in 1968 by incorporation. In 1986, the New Brunswick legislature enacted *An Act Respecting the New Brunswick Society of Certified Engineering Technicians and Technologists Inc.* (“the *Engineering Technology Act*”), which states in its preamble as follows:

*... to continue the New Brunswick Society of Certified Engineering Technicians and Technologists Inc. as a body corporate for the purpose of advancing and maintaining the standard of engineering technology in the Province, for governing and regulating engineering technology services provided by its members and providing for the welfare of members of the public and members of the New Brunswick Society of Certified Engineering Technicians and Technologists Inc. ....*

[74] Concerning NBSCETT membership, that Act states as follows:

...

*2(2) The words “engineering technician”, “engineering technologist”, “certified engineering technician”, “certified engineering technologist”, “duly qualified engineering technician”, “duly qualified engineering technologist”, and the initials “CET”, “C.E.T.”, “A.Sc.T.” or “C.Tech.” or any like words, initials or expressions used alone or in combination with other words or expressions connoting a person recognized by law as an engineering technician or engineering technologist or person entitled to carry on the occupation of engineering technology or connoting a member of the Society in the Province, when used in any provision of an Act of the Legislature or any regulation, rule, order or bylaws made under an Act of the Legislature enacted or made before, at or after the commencement of this Act or when used in any public document, shall be read as including a person whose name is entered in the register or the temporary register.*

*12(1) Any person whose name is entered in the register, subject to any conditions, limitations or restriction set out in his certificate, the bylaws or rules, is entitled to hold himself*

*out as a certified engineering technician or certified engineering technologist, as the case may be, to use the designations "CET" or "C.E.T.," indicating that he is a certified engineering technician or certified engineering technologist as the case may be and is entitled to carry on the occupation of engineering technology.*

...

[75] The following is from the NBSCETT's website:

...

*... The titles Certified Engineering Technician (CET), Certified Technician (CTech), Certified Engineering Technologist (CET), Professional Technologists (PTech), and Applied Science Technologist (AScT) are formal professional designations which are copyright protected by the Canadian Council of Technicians and Technologists (CCTT); and are granted to, and may only be used by the members of CCTT Constituent Members, such as NBSCETT, and are controlled by the Engineering Technology Act.*

[76] A further perusal of the NBSCETT website, in the section entitled "About Us", indicates:

*Established in 1968, NBSCETT is New Brunswick's independent certifying body for engineering/applied science technicians and technologists. Certification is accomplished by a Certification Board which includes a panel of technical experts from varied disciplines. The Board evaluates applications and recommends certification to the Society Council of engineering/applied science technicians and technologists who meet recognized national benchmarks in education and experience.*

*NBSCETT confers the designations "CTech" and "PTech" which are symbols of achievement in engineering/applied science technology and are legally protected for use only by fully certified members. Other designations which have been granted by the Society are 'CET', Certified Engineering Technician and 'CET', Certified Engineering Technologist. The designations are recognized across Canada by employers and other engineering professionals through the efforts of provincial associations that make up the Canadian Council of Technicians and Technologists (CCTT).*

...

[77] The Canadian Council of Technicians and Technologists (CCTT) states on its website that it is responsible for accrediting the programs that train technicians and technologists in Canada (see “About Us”). Its website also includes the following under “Services for Immigrants/Certified Technicians and Technologists”:

...

*While you do not need a license [sic] in Canada to practice as an Engineering Technician or Technologist, to be fully recognized by the industry you need to become certified.*

*Similar to certified Engineers who have the professional designation P.Eng (Professional Engineer), Canadian certified engineering technicians and technologists have following [sic] designations:*

- *CET (Certified Engineering Technologist)*
- *A Sc T (Applied Science Technologist)*
- *RET (Registered Engineering Technologist)*
- *TP (Technologue Professionnel)*
- *PTech (Professional Technologist)*
- *CTech (Certified Technician)*

*Professional designation depends on province of issue.*

[Emphasis in the original]

[78] Both the NBSCETT and the CCTT websites indicate that “Certified Technician” is a certification to practice as an Engineering Technician.

[79] I am satisfied that the respondent properly found the appointee to be “a member of NBSCETT ... at the engineering technician level” as a full member of the NBSCETT, whose name appears on the register, with the title, “Certified Technician”.

## **V. Conclusion and decision**

[80] The complainant started working at CFB Gagetown in 1985 as a painter. He rose to become a senior project manager. It is understandable that given his long and varied experience, he thought he had a chance to obtain the position of the superintendent of the production shops. It is also understandable that he would suspect bias given the clear indication that in 2013, the base commander would not consider him for the

position at issue.

[81] However, the appearance of bias disappeared with the departure of the base commander. I believe the respondent witnesses, who stated that the complainant had a fair opportunity to compete for the job. The respondent has not disputed that he was qualified for the position, but it chose another person as being more suitable. Having carefully reviewed all the evidence, I cannot say that the respondent abused its authority in doing so. Although both the complainant and the appointee had the essential qualifications for the position, it was the respondent's prerogative to award the appointment to the person who earned the highest scores in the assessment. I have found no bias, and the appointee was fully qualified for the position. Even if the complainant had been awarded an additional point on the written exam, and even if the assessment of A6 had been more generous, the respondent's decisions for the acting and indeterminate appointments would still be reasonable and would not constitute an abuse of authority.

[82] For all of the above reasons, the Board makes the following order:

*(The Order appears on the next page)*

**VI. Order**

[83] The complaints are dismissed.

March 15, 2018.

**Marie-Claire Perrault,  
a panel of the Federal Public Sector Labour  
Relations and Employment Board**